REMARKS

The only issue remaining in this case is the provisional statutory double patenting rejection under 35 U.S.C. §101 based upon the claims in co-pending application no. 09/782,753. With respect to this rejection, applicants would respectfully submit that there clearly is no issue of statutory double patenting (35 U.S.C. §101) should the claims of application no. 09/782,753 issue in a patent. In this regard, attention is respectfully invited to *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970), which addresses the issue of "same invention" double patenting. In addressing the statutory double patenting issue, the court stated two questions to be considered in a double patenting analysis. The first question, relating to statutory double patenting under 35 U.S.C. §101 is as follows:

> "Is the same invention being claimed twice?...'invention' here means what is defined in the claims...By 'same invention' we mean identical subject matter." (164 USPQ 621)

As addressed in *In re Vogel*, the test for "same invention" is clearly whether or not identical subject matter is being claimed. If identical subject matter is not being claimed in both cases, there is no "same invention" and there is no issue of double patenting under 35 U.S.C. §101 and the analysis then moves to the second questions which addresses "obviousness type" double patenting.

The Vogel test is followed in MPEP §804(II)(A), "Statutory Double Patenting - 35 U.S.C. 101." As stated there, "Same invention' means identical subject matter." (citing cases) This section of the MPEP then goes on to apply the Vogel test:

> "A reliable test for double patenting under 35 U.S.C. 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent. *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970). Is there an embodiment of the invention that falls within the scope of one claim, but not the other? If there is such an embodiment, then identical

subject matter is not defined by both claims and statutory double patenting would not exist."

In this application and in co-pending application no. 09/782,573, the same subject matter clearly is not being claimed. In application serial no. 09/782,753, each of the independent claims requires that the alumoxane cocatalyst incorporated on the support particles is "predominantly on the external surface thereof." (See independent claims 1 and 25 of serial no. 09/782,753.) The claims in this application, on the other hand, preclude this characteristic as set forth in the claims of serial no. 09/782,753 and instead call for an alumoxane cocatalyst within the internal pore volume of the support particles. Thus, independent claim 1 of this application recites in subparagraph (a), "...silica particles impregnated with an alumoxane cocatalyst with at least one-half of said cocatalyst disposed within the internal pore volume of said silica particles;" Independent claim 23 of this application calls for in subparagraph (a), "...spheroidal silica particles having an average pore size within the range of 20-60 microns and an average effective pore diameter within the range of 200-400 Angstroms;" in subparagraph (b), "contacting said particulate support material with an alumoxane cocatalyst in an aromatic carrier liquid;" and in subparagraph (c), "heating said mixture...for a period sufficient to fix said alumoxane on said particulate support material with at least one-half of said cocatalyst disposed within the internal pore volume of said silica particles;" As can be seen by the foregoing, the Vogel test for "same invention" is not met. In fact, the claims here and in application serial no. 09/782,753 go far beyond the relationship of the Vogel test in that the two groups of claims are mutually exclusive in terms of the disposition of the alumoxane cocatalyst. There is no statutory double-patenting issue involved in this application and application serial no. 09/782,753.

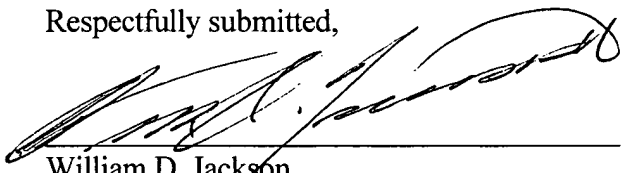
Further, in view of the distinct differences in claimed subject matter as pointed out above, there would not appear to be an issue of obviousness type double patenting evidenced in the

claims of the two applications. However, assuming the contrary and assuming obviousness type double patenting to be present, giving rise to a provisional obviousness type double patenting rejection, under the procedure set forth in MPEP §804(I)(B), it is noted that a terminal disclaimer against application serial no. 09/782,753 was submitted in this application on August 14, 2003. Should there be a provisional double patenting rejection that becomes an actual double patenting rejection upon the issuance of the application as a patent, the terminal disclaimer should then be given effect.

For the reasons set forth in this response, this application would now appear to be in condition for allowance and such action is respectfully requested.

The Commissioner is authorized to charge any fee required in connection with the submission of this document to the Locke Liddell & Sapp LLP deposit account no. 12-1781.

Respectfully submitted,



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